Submitted 1-426 Judge Davis
Nov 30. 75
Affirms
Fraudulent Insolvency

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 270. 5-8

IRA P. NUDD AND S. R. NOE, PLAINTIFFS IN ERROR,

vs.

GEORGE B. BURROWS, ASSIGNEE OF THE ESTATE OF NORTON EMMONS, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1873.

Swayne
Judge Davis

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1 In the circuit court of the United States for the northern district of Illinois, began and held on the first Monday of October, A. D. one thousand eight hundred and seventy-two, in the city of Chicago, in said district, and on Friday, June 13th, 1873, before the judges thereof, the following proceedings were had in said entitled cause.

WM. H. BRADLEY, *Clerk.*

GEORGE B. BURROWS, AS ASSIGNEE OF THE estate and effects of Norton Emmons, a bankrupt,
*v.*
IRA P. NUDD AND S. R. NOE. } Trespass on the case.

Be it remembered that on the twenty-fifth day of September, A. D. 1872, the said plaintiff, by Tenny, McClellan and Tenny, his attorneys, filed in the office of the clerk of the circuit court of the United
2 States for the northern district of Illinois, a precipe for summons against said defendants, which reads in the words and figures following, to wit:

United States circuit court, northern district of Illinois, ss:

GEORGE B. BURROWS, AS ASSIGNEE OF THE estate and effects of Norton Emmons, a bankrupt, plaintiff,
*v.*
IRA P. NUDD AND S. R. NOE, DEFENDANT'. } Damages, $10,000.

The clerk of said court will issue a summons in the above-entitled cause to said defendant in a plea of trespass on the case, to the damage of said plaintiff in the sum of ten thousand dollars, direct the same to the marshal to execute, and make it returnable to the October term of said court, A. D. 1872.

TENNEY, MCCLELLAND & TENNY,
*Plaintiff's Attorneys.*

To WM. H. BRADLEY, Esq., *Clerk.*
CHICAGO, *Sept.* 24, 1872.

(Endorsed:) Filed this 25th day of Sept., A. D. 1872. Wm. H. Bradley, clerk.

3 Also filed their bond for costs, which reads in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court, October term, A. D. 1872.

GEORGE B. BURROWS, ASSIGNEE, &C.,
*v.*
IRA P. NUDD AND S. R. NOE.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any

of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against me.

Dated this 24th day of Sept., A. D. 1872.

D. K. TENNY.

(Endorsed:) Filed Sept. 25th, 1872. Wm. H. Bradley, clerk.

4 And thereupon a summons issued against said defendants in the words and figures following, to wit, and the marshal's return thereon reads as follows:

Circuit court of the United States of America, northern district of Illinois.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Ira P. Nudd and S. R. Noe, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto George B. Burrows, as assignee of the estate and effects of Norton Emmons, a bankrupt, of a plea of trespass on the case, to his damage, as he alleges, of ten thousand dollars; and have you then and there this writ.

5 Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 25th day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 97th year.

[L. S.] WM. H. BRADLEY, *Clerk.*

*Marshal's return.*

I served the within summons by reading the same to and in the presence and hearing of Ira P. Nudd and S. R. Noe, therein named, on the 25th day of September, 1872.

B. H. CAMPBELL, *U. S. Marshal,*
By S. H. TOURTELEOTTE, *Deputy.*

(Endorsed:) Filed Oct. 7th, A. D. 1872. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 25th day Sept., A. D. 1872, the plaintiffs, by *their* attorneys, filed the following declaration against said defendant', to wit:

Circuit court of the United States for the northern district of Illinois, of October term, 1872.

GEORGE B. BURROWS, ASSIGNEE, &C.,
*v.*
IRA P. NUDD AND S. R. NOE.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

6 George B. Burrows, plaintiff in this suit, who sues as the assignee in bankruptcy of the estate and effects of Norton Emmons, and who is a citizen of the State of Wisconsin, (said Emmons

being a bankrupt, duly adjudicated such under and by virtue of an act *act* entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, as hereinafter mentioned,) by Tenny, McClellan & Tenney, his attorneys, complains of Ira P. Nudd and S. R. Noe, who are citizens of the State of Illinois, defendants, who have been summoned of a plea of trespass on the case.

For that, whereas heretofore, to wit, on the seventh day of January, A. D. 1871, at the district aforesaid, the said Norton Emmons was insolvent, and acting in contemplation of insolvency and with a view to give a preference to the defendants, who were then and there his creditor, the said Norton Emmons did then and there make an assignment, transfer, and conveyance of a part of his property, to wit, eleven car-loads of live stock, consisting of cattle, sheep, and hogs; two car-
loads of dressed hogs, and one thousand dollars in Treasury notes
7 and national-bank notes of the United States, of great value, to wit, of the value of ten thousand dollars, to the defendants, who received the same, although they then and there had reasonable cause to believe that said Norton Emmons was insolvent, and that such assignment, transfer, and conveyance was made in fraud of the provisions of said act and to defeat the object thereof, and with a view to prevent the property of said bankrupt from coming to his assignee in bankruptcy. And whereas within four months afterwards, to wit, on the eighteenth day of February, A. D. 1871, a petition was duly filed in the district court of the United States for the western district of Wisconsin, in bankruptcy, by creditors of the said Norton Emmons, praying that he might be adjudged bankrupt; and such proceedings were thereupon had that afterwards the said Norton Emmons was duly adjudic'ted bankrupt by said court, and the plaintiff was duly
8 appointed assignee of the estate of said bankrupt, and qualified as such; and afterwards, and before the commencement of this suit, the register designated by said court, by an instrument under his hand, duly assigned and conveyed to the plaintiff all the estate of said bankrupt, as provided by said act.

And whereas afterwards, to wit, on the 24th day of September, A. D. 1872, and at divers other times, at the district aforesaid, the plaintiff demanded said property, or the value thereof, from the defendant. Yet the said defendants have not delivered over or paid to the plaintiff the said property or its value, or any part thereof, but so to do have wholly neglected and refused, and, on the contrary thereof, have converted the same to their own use, to wit, at the time and place aforesaid, by reason whereof the same has been wholly lost to the plaintiff. Wherefore the plaintiff says that he has sustained damage as assignee as aforesaid, by
said wrongful acts of the defendant, to the amount of ten thous-
9 and dollars, and therefore he bring' suits, &c.

TENNY, McCLELLAN & TENNEY,
*Plff.'s Attys.*

(Endorsed:) Filed Sept. 25th, 1872. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 9th day of October, A. D. 1872, the defendants, by Grant & Swift, their attorneys, come and file their pleas to said declaration in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court of the United States, northern district of Illinois, October term, A. D. 1872.

IRA P. NUDD AND S. R. NOE
*ads.*
GEORGE B. BURROWS, ASSIGNEE, &C.

And the said defendants, by Grant and Swift, their attorneys,
10 come and defend the wrong and injury when, &c., and say that they are not, nor either is of them, guilty of the said supposed grevances above laid to their charge, or any, or either, or any part thereof, in the manner and form as the said complainant hath above thereof complained against them; and of this they put themselves upon the country, &c.

GRANT & SWIFT,
*Defts' Attys.*

(Endorsed:) Filed Oct. 9, 1872. Wm. H. Bradley, clk.

And afterwards, to wit, on Tuesday, the twenty-second day of April, A. D. 1873, the following proceedings were had in said cause, before the Hon. James C. Hopkins, judge, to wit:

GEORGE B. BURROWS, ASSIGNEE, &C.,
*v.*
IRA P. NUDD AND S. R. NOE. } Trespass on the case.

Now come the parties, by their attorneys, and upon issue joined thereupon, comes a jury of good and lawful men, to wit: James B. Young,
11 A. W. Streeter, John Adriance, A. R. McKenny, Enos Pyle, James Allen, George Wells, Samuel Haynes, William Durno, S. W. Hopping, W. Porter, and C. H. Ward, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed to to-morrow morning.

And afterwards, to wit, on the twenty-third day of April, A. D. 1873, before the same judge, in the record of the proceedings of said court is the following entry, to wit:

GEORGE B. BURROWS ASSIGNEE, &C.,
*v.*
IRA P. NUDD ET AL. } Trespass on the case.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment
12 having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the twenty-fourth day of April, A. D. 1873, before the same judge, in the record of the proceedings of said court is the following entry, to wit:

GEORGE B. BURROWS, ASSIGNEE, &C., } Trespass on the case.
*v.*
IRA P. NUDD AND S. R. NOE. }

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and, after hearing the concluding evidence, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the twenty-fifth day of April, A. D. 1873, before the same judge, in the records of the proceedings of said court is the following entry, to wit:

GEORGE B. BURROWS, ASSIGNEE, &C., } Trespass on the case.
*v.*
IRA P. NUDD AND S. R. NOE. }

13 Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the twenty-sixth day of April, A. D. 1873, before the same judge, in the record in the proceedings of said court, is the following entry, to wit:

GEORGE B. BURROWS, ASSIGNEE, &C., } Trespass on the case.
*v.*
IRA P. NUDD AND S. R. NOE. }

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and, after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and, after a short absence, the jury returned into court the following verdict, to wit:

14 We, the jury, find the defendants guilty, and assess the plaintiff's damages to the sum of nine thousand seven hundred and twenty-nine dollars and forty-five cents.

And thereupon the defendants, by their attorney, move the court for a new trial herein.

And afterwards, to wit, on the second day of May, A. D. 1873, before the same judge, in the record of the proceedings of said court, is the following entry, to wit:

GEORGE BURROWS, ASSIGNEE, &C., } Trespass on the case.
*v.*
IRA P. NUDD ET AL. }

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendants heretofore entered herein for a new trial of this cause, and, after hearing the arguments of counsel, the court not being sufficiently advised in the premises, takes time to consider.

And afterwards, to wit, on Tuesday, June 3d, 1873, in the record of the proceedings of said court, is the following entry, to wit:

15 Before the Hon. Henry W. Blodgett, district judge.

GEORGE B. BURROWS, ASSIGNEE, &C., v. IRA P. NUDD ET AL. } Trespass on the case.

This cause having been heretofore tried to a jury, before Judge Hopkins, and a motion entered by the defendants for a new trial, which was heard by him, and a written order having this day been received from said judge overruling said motion, now come the defendants, by their attorney, and moves in arrest of judgment.

And afterward, to wit, on the thirteenth day of June, A. D. 1873, in the record of the proceedings of said court, before the Hon. Henry W. Blodgett, district judge, appears the following entry, to wit:

16 GEORGE B. BURROWS, ASSIGNEE OF THE estate and effects of Norton Emmons, a bankrupt, v. IRA P. NUDD AND S. R. NOE. } Trespass on the case.

Now come the defendants, by their attorneys, and wish leave of the court withdraw their motion heretofore entered herein in arrest of judgment, and the motion of the defendants herein for a new trial having been overruled by a written order of Judge Hopekins, and judgment now awarded upon the verdict of the jury,

It is thereupon consid'red and adjudged by the court that the plaintiff do have and recover of the defendants the said sum of nine thousand and seven hundred and twenty-nine dollars and forty-five cents, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of one hundred sixty-nine dollars and seventy-three cents, and that he have execution therefor.

On the hearing of said entitled cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois.

GEORGE B. BURROWS, ASSIGNEE IN BANKruptcy of the estate of Norton Emmons, v. IRA P. NUDD AND SAMUEL R. NOE.

Be it remembered that said cause coming on for trial upon the 22nd day of April, A. D. 1873, being of the March term of said court, before his honor, Judge James C. Hopkins, then holding said court, the plaintiff introduced evidence tending to show that said Norton Em-

18 mons had been for a number of years engaged in the stock business in Wisconsin, purchasing cattle, sheep, and hogs, and shipping them, chiefly, but not always, to the defendants at Chicago, to sell upon commission; that about the 1st day of July, 1870, said Emmons associated with him one Richard B. Chandler and one James W. Chand-

ler, and that said parties thenceforth, under the firm-name of Emmons & Chandler, continued the same business, also shipping the stock which they bought chiefly to the defendants; that about the 13th day of December, 1870, said firm was indebted to the defendants between four and five thousand dollars; that at this time Norton Emmons was insolvent; that at this time it was arranged between the defendants, said Emmons and said Richard B. and James W. Chandler, that said firm of Emmons and Chandler should dissolve; that said James W. Chandler had previously gone out; that said Emmons should continue the business until the first of the following January, and should, at the
19 close of the year, buy a large shipment of stock upon credit, which should be shipped to the defendants, sold by them, and the proceeds applied to pay the indebtedness to the defendants; that said firm of Emmons & Chandler did dissolve about the 13th day of December; that said Emmons did in the first four days of the following January, in his own name and on his own account, ship to the defendants nine car-loads of cattle, sheep, and hogs, which were sold by the defendants and the proceeds held by the defendants to pay the said indebtedness to them; that upon the 6th day of January, 1871, said Emmons paid to the defendants one thousand dollars in money; that the net proceeds of said last shipment, so held by the defendants, was seven thousand five hundred and fifty-three $\frac{27}{100}$ dollars; that a large part of the stock which went into the last shipment was paid for by drafts drawn by the said Norton Emmons on the defendants, and which drafts were not accepted or paid by the drawees—said defendants; that the amount for which drafts were so drawn and unpaid was about four thousand dollars; that a petition in bankruptcy was filed against said
20 Emmons in the district court of the United States for the eastern district of Wisconsin on the 18th day of February, A. D. 1871, on which petition said Emmons was duly adjudicated a bankrupt; that the defendants at the time of making the aforesaid arrangement, to wit, on or about the 13th day of December, 1870, had reasonable cause to believe said Emmons was insolvent.

As tending to show some of said matters, the plaintiff introduced in evidence a document reading as follows:

"CHICAGO, *December* 13, 1870.

"To whom it may concern:

"This certifies that whereas Mr. R. B. Chandler has been a joint partner with Norton Emmons from the 1st day of July, 1870, to date, we release him from all further obligations that may be transacted between us and Norton Emmons and look to Norton Emmons only for balance of present account and all business that may hereafter be transacted with him.

"The above release of R. B. Chandler is made by the consent of all parties.

"I. P. NUDD & CO."

21 Also, the ledger of the defendants, showing the account of Norton Emmons and of the firm of Emmons & Chandler with the defendants.

The last item upon the account of Emmons & Chandler is as follows:

"1870, Dec. 13. By balance due Nudd, 1,617.43."

Under which is written the following:

"The above balance we transfer to the individual a/c of Norton Emmons, by request of both parties."

Immediately after and upon the same ledger-page is the following, showing all the entries made subsequent to said December 13th, 1870:

22 DR. NORTON EMMONS. CR.

| 1870. | | | | 1870. | | | |
|---|---|---|---|---|---|---|---|
| December | 13 | To balance due Nudd and transferred from the ac. of Emmons & Chandler | $1,617 43 | Dec. | 24 | By nett proceeds | $1,140 07 |
| " | 13 | To paid draft | 1,500 00 | " | 24 | " " " | 4,767 51 |
| " | 14 | " " " | 1,500 | " | 3 | " dressed hogs | 107 04 |
| " | 15 | " " " | 1,500 | " | 28 | " " proceeds | 651 88 |
| " | 16 | " " E. Peterson | 750 | " | 28 | " " " | 766 31 |
| " | 21 | " " draft | 187 | " | 28 | " " " | 1,929 48 |
| " | 22 | " " " | 1,500 | " | 29 | " " " | 765 84 |
| " | 23 | " " " | 3,500 | " | 20 | E. & C., dressed hogs | 1,396 64 |
| | | | | " | | " " | |
| " | 23 | " " " | 200 | " | 29 | E. & C., dressed hogs | 863 58 |
| | | | | 1871. | | | |
| " | 23 | " " " | 500 | Jan'y. | 7 | " " " | 1,444 15 |
| " | 24 | " S. W. Montague | 55 72 | " | 6 | " " cash rec'd | 1,000 |
| " | 24 | " " draft | 1,000 | " | 10 | " nett proceeds | 4,002 03 |
| " | 24 | " " " | 400 | " | 10 | " " dr. h | 1,174 37 |
| " | 16 | " Chandler | 40 | " | 10 | " " dr. h | 1,268 16 |
| " | 16 | " Peterson | 35 | | | | |
| " | 16 | " " Johnson | 5 | | | | |
| " | 3 | " protest fees | 10 20 | | | | |
| " | 27 | " " draft | 300 | | | | |
| " | 28 | " " " | 600 | | | | |
| " | 31 | " " " | 4,000 | | | | |
| " | 31 | " " " | 1,000 | | | | |
| " | 31 | " " " | 750 | | | | |
| Jan'y. | 11 | " acceptance | 334 84 | | | | |
| | | | $21,277 06 | | | | $21,277 06 |

23 A witness for the plaintiff testified that he was present when Norton Emmons engaged Shumway to work for him; in connection with which testimony plaintiff put the following question:

Q. What did Emmons say to Shumway at the time he engaged?

A. To which the witness answered: "He said he wanted to make a big shipment this time; that is, he said he thought stock was going to increase in value, and he thought it was a good time to buy."

And the plaintiff put the further question:

Q. What instruction, if any, did he give him as to buying stock?

A. To which the witness answered: Nothing particularly, only that he wanted to get in a big shipment; that he thought it was a good time to buy, for stock might come up. He told him what prices to give, and if it was a particularly nice lot, to give a little more; that he was running the business alone.

Another witness for the plaintiff testified: I had some conversation with Mr. Emmons, between Chicago and Oregon, when we were returning together from the shipment before the last one; in con-
24 nection with which testimony the plaintiff put the following question:

Q. What did he say in regard to buying stock, at that conversation?

A. To which the witness answered: "He said that the first week in January, he wanted to make a large shipment. He wanted to get in all the stock he could. He said something in regard to my buying for him. He said that he would like to have me buy that week." The same witness further testified: I had some conversation with Mr. Emmons at my barn about the time that Mr. Illingworth made complaint against Emmons in police court. I can't state all the conversation. He said that Illingworth took him with a warrant for obtaining goods under false pretences; but he said, I am owing you and intend to pay you all

I owe. In connection with which testimony the plaintiff put the following question:

What did he say with regard to the Viall note in that conversation?

To which the witness answered: "He said that Viall had signed a note with him, as I understood him, at the bank for a thousand dollars when he started away; that is, when he went from here to Chicago. It wasn't paid. That he took $1,000 in his pocket, and took it to
25 Chicago with him. He found out then from Mr. Nudd that the Viall note or draft, or whatever it was, had been paid; that he paid the money over to Mr. Nudd; that he had no money of any account; that he might just as well have kept that $1,000 as not; that it was about all there was about the Viall note; that Mr. Viall was a friend of his and he was bound to see him protected, as he was all of his friends; that there was no man or friend that he owed but what he would see them paid as soon as he could pay them. This conversation grew out of his application to me to go his bail in the Illingworth suit, and to come up as a witness, which I did.

Whereupon the plaintiff put the following question:

Q. State whether or not, in this conversation, in speaking of taking that $1,000 with him to Chicago for the protectio n of Mr. Viall, that one reason for his doing so was that he didn't know but Nudd might shut down upon him, or words to that effect?

A. To which the witness answered: "That was his reason for taking it. He had got to have a settlement with Nudd, and he didn't
26 know, when he started, whether Nudd would let him run any longer or not."

A witness for the plaintiff testified that he bought some part of the stock for the last shipment; in connection with which testimony the plaintiff asked him the following questions:

Q. What instructions, if any, did he (Emmons) give you with regard to purchasing stock for that shipment?

A. To which he answered: "I was to buy them—any way to buy them—anything so that there wouldn't anybody mistrust I was paying too much, and pass of' his drafts on I. P. Nudd to pay for them.

Q. What, if anything, did he say as to the amount of money to be used?

Answer. "He said it would take quite a large amount of good money to pass off quite a small amount of counterfeit money. The idea was here: he meant that if folks came and wanted money for their cattle to pay them the money, but if I could shove off these drafts on them, why to do it."

(And to each of said questions, because calling for declarations of said Emmons not made in the presence of either of the defendants,
27 or brought to the knowledge of either of them, and to the answers thereto, the defendants objected, because said declarations, not being made in the presence of either of the defendants, nor brought to the knowledge of either of them, could not be used to prejudice them; which objections being overruled by the court, and the answers admitted, the defendants then and there excepted.)

28 The defendants introduced evidence upon the trial of said cause tending to show that they acted as the factors of said Emmons prior to the time of his partnership with Richard B. and James W. Chandler, and for said firm of Emmons and Chandler after that time and until the closing of the account, January 10th, 1871; that during all this time it had been the usual course of business and the regular practice of the defendants to advance money to these parties to buy

stock, relying upon the consignments to be made to them to cover such advances; that the defendants continued to make such advances after the 13th day of December, 1870, in the same manner as before, receiving consignments and selling the same to cover their previous advances; that the indebtedness to the defendants at the time of the last shipments of stock was for such advances; that these advances were made by payment of drafts drawn upon the defendants; that such drafts were drawn in the name of Norton Emmons alone, as drawer, as well after the formation of the copartnership of Emmons & Chandler as before that time; that the bank business of the firm of Emmons &
29 Chandler was done at the First National Bank of Madison, Wisconsin, in the name of said Emmons alone, as well after the formation of said copartnership as before that time, and that the drafts upon the defendants usually came through said bank; that their ledger, introduced in evidence, (vide page 5 of bill of exceptions,) correctly shows the sums advanced by them upon drafts since the 13th December, 1870; that such advances were made in good faith and in the usual and ordinary course of business, and relying upon consignments to be made to the defendants to cover such advances; that there was no such arrangement for the payment of the indebtedness to the defendants made about the 13th of December, 1870, or at any other time, between the defendants, or either of them, and said Emmons, Richard B. Chandler, and James W. Chandler, or either of them, as claimed by the plaintiff; that said firm of Emmons & Chandler did not dissolve upon or about the 13th December, 1870; that said James W. Chandler did not go out before that time, but that certainly James W. Chandler, and probably Richard B. Chandler, continued to be interested in business with
30 said Emmons subsequently to that time, and continued so interested till the time of the closing of the account with defendants, January 10th, 1871; that the transfer of the account on the book of the defendants (vide page 5 of the bill of exceptions) from the name of Emmons & Chandler to the name of Norton Emmons was made at the request of said Emmons and the Chandlers; that the reason given to defendants for such request was that all drafts were drawn in the name of Norton Emmons alone; their bank business at Madison, Wisconsin, was done in the name of Norton Emmons alone, and they desired their account on the defendants' books to correspond; that defendants had no idea that the firm of Emmons & Chandler was dissolved or that their dealings with said firm were thereby brought to a close, or that by making such a change they released either of the Chandlers, but regarded the transfer simply as a change in the manner of keeping their books; that the receipt or release to Richard B. Chandler (vide page 3 of bill of exceptions) was not given to him until about the middle of January, 1871, after the account with the defendants was closed; that it was antedated at the request of said Richard B. Chandler; that
31 said receipt or release was given by the defendants unhesitatingly and with but little inquiry into the reasons of said Chandler for wishing the same antedated, because at the time it was actually given their account was paid in full; that business was conducted in the same manner subsequent to the 13th December, 1870, as before that time, and the defendants supposed they were doing business with the firm of Emmons & Chandler up to the time the account was closed, and until such time knew of nothing from which they could infer the dissolution of said firm; that there was nothing unusual about the size or quality of the last shipments, and the same were not, nor was any part of them, sold by the defendants under any arrangement with said Em-

mons and the Chandlers, or either of them, that the proceeds should be used to close up the account with the defendants; that shipments continued to be made after December 13th, 1870, and up to the time of the closing of the account, with one or two exceptions, in the name of Emmons & Chandler, and not in the name and on account of Emmons alone; that Richard B. Chandler was a man worth $15,000
32 or $20,000; that James W. Chandler was a man of small means, but solvent; that if the copartnership of Emmons & Chandler continued subsequent to the 13th December, 1870, and up to the time of closing the account, said firm was not insolvent; that the defendants did not know at any time prior to the closing of said account that said Emmons was insolvent, and that they had no reasonable cause to believe that he was. A witness for the defendants testified that the partnership between said Emmons, Richard B. Chandler, and James W. Chandler continued until some time in January of 1871. In connection with this testimony, defendants' counsel put the following question:

Q. What, if anything, did Richard Chandler say to you after the 13th of December respecting his being interested in the firm carried on in the name of Norton Emmons?

To which question plaintiff objected, and the objection was sustained by the court; to which ruling the defendants then and there excepted.

A witness for the defendants testified that James W. Chandler frequently came to Chicago after Dec. 13th, 1870, in charge of the consignments of stock. In connection with this testimony defendants put the following question:

33 Question. What was said, if anything, respecting the sale or prices at which stock should be sold?

To which question, and to the admission of any declarations of James W. Chandler, plaintiff objected. The court sustained the objection and refused to admit the evidence, and to this ruling of the court the defendants then and there excepted.

Before the court charged the jury, and in apt time, defendants' counsel requested the court to in all respects in such charge be governed by and follow the practice of courts of record of the State of Illinois and the laws of the State of Illinois applying to such matters; but the court refused to follow such practice and such law; to which refusal defendants' counsel then and there excepted.

Defendants' counsel then prepared and handed to the court the following written instructions, requesting that the same should be given to the jury, and that they should be delivered to the jury to take with them to their room:

"First. If the jury believe, from the evidence, that either R. B. or J. W. Chandler was a partner with Norton Emmons subsequent to the 13th of December, 1870, and remained so until the settlement of the
34 account with the defendants, and as such partner or partners was or were interested in the dealings with the defendants subsequent to that date, they are instructed that, in such case, the plaintiff cannot maintain this suit.

"Second. If the jury believe from the evidence that the defendants advanced money to Norton Emmons to buy stock to be consigned to them, relying upon those consignments for the repayment of those advances, they are instructed that, in such a case, the defendants would have a lien upon such consignments for such advances as soon as the same came to their possession, even if the defendants knew at the time of making such advances that said Emmons was insolvent."

The court gave to the jury the first instruction asked, but added to and commented upon the same as follows:

"I have charged you, as requested by the defendants' counsel, that if this debt on the part of the defendants was against Emmons and the Chandlers, or either of them, the plaintiff cannot recover. * * * * On the main question, which covers most of the property, I shall not occupy much time. The evidence to establish it rests in writing, under the defendants' own signature. By the defendants' books it ap-
35 pears that the partnership account of Emmons & Co. was settled, and balance transferred upon their books to the individual account of Norton Emmons on the 13th of December; that after that it was kept with him alone, and the defendants did not pay any amount to the Chandlers without an order from Emmons, and, in addition to this, they signed a receipt, release, or declaration, as follows:

"'CHICAGO, *December* 13, 1870.

"'To whom it may concern:

"'This certifies that whereas Mr. R. B. Chandler has been a joint partner with Norton Emmons from the first day of July, 1870, to date, we release him from any further obligation that may be transacted between us and Norton Emmons, and look to Norton Emmons only for balance of present account and all business that may hereafter be transacted with him.

"'The above release of R. B. Chandler is made by the consent of all parties.'

"That would seem to settle all controversy upon this question. That matter having been so carefully reduced to writing by the defendants at the time, or soon after, while the matter was fresh in their memory, it would seem most remarkable to allow them now to swear it away.
36 The book and the release show that they agreed to deal thereafter with Emmons, and released Chandler altogether, and did so on their books. So far as Chandler and Emmons are concerned, it was an individual matter with them, but as the assignee represents Emmons' right and is entitled to the benefits under his contract, as to him, it would be very remarkable that they could, in view of these entries and the statement or release, be allowed to set up that he was still a party in interest as to that. Written testimony is much stronger than parol. It is like a disputed case in regard to the boundaries of real estate in which a Government boundary is discovered. It generally disposes of the dispute, and outweighs, ordinarily, any amount of verbal testimony depending upon the recollection of witnesses, particularly interested parties and witnesses.

"Nudd says he drew the release, but he says he did not draw it until in January, after that date. The time when it was drawn is quite immaterial. It declares the fact that they did business with Emmons alone, and if that is so, that disposes of the defence on that ground. There is some testimony that the receipt was given to Chandler on the 13th. Emmons says he heard him say that he had a receipt when he returned home.

37 "If you are satisfied that the receipt was made at the time it bears date, or afterwards, with a view to furnish evidence to release Chandler from the 13th, and as stating the true condition of their affairs, I hardly think that you will be justified in finding that the transaction between the parties was not as stated in the books of the defendants and this release or declaration; and it would be unsafe to reject written evidence of that character upon the evidence of interested parties."

To all which modifications and comments, and to all which portion of the charge save that part requested by the defendants, the defendants then and there excepted.

The court also gave to the jury the second instruction asked by the defendants, and modified the same and commented thereon in the following language:

"The books of account of defendants, read in evidence, together with the testimony, tend to show that the defendants had been advancing the bankrupt money from time to time after the 13th day of December, 1870, and that on the 31st day of December, 1870, the time of the last item of account, the bankrupt was owing to them the sum of
38 $8,553\frac{87}{100}$. This money it is claimed was advanced by defendants, who were stock-brokers and general commission men in this city, engaged in the business of receiving stock, cattle, and hogs, making advances thereon, and selling for the benefit of shippers. They state that their ordinary mode of doing business was not to pay drafts drawn by their country customers or consignors until after the receipt of stock, but in this case they permitted the bankrupt to draw and obtain the money to use in buying stock. When that stock was received and sold, they credited his account with the proceeds, and such appears to have been the way they dealt with the bankrupt, so that he had overdrawn his shipments on the 1st day of January in the sum of $8,553\frac{87}{100}$, above stated. This being the mode of business pursued, as I understand to be stated, I think it would constitute the relation of debtor and creditor between the bankrupt and the defendants; that he, in law and fact, was owing on the 1st of January to the amount above stated, which was unsecured at that time; that the advances did not create a lien on such stock purchased with the money advanced or loaned for that purpose, until the bankrupt had actually shipped them to the defendant.

39 "As I have charged you, at the request of the defendants' counsel, that the lien of the defendants did not attach until the actual receipt of the stock by the defendants, such being the law, the subsequent receipt of stock and appropriation of the avails to the payment of the debts due them would be void, as a preferential payment, provided the other facts hereinafter mentioned are found to have existed; by which I mean to be understood that if the transactions between the parties were as I have before stated them, they would constitute the relation of debtor and creditor, and bring their debt under the provisions of the bankrupt act the same as any other debt."

To which modifications and comments, and to all such portion of said charge, defendants' counsel then and there excepted.

The court also charged the jury upon the facts in said cause, notwithstanding the request of the defendants' counsel that the court would, in charging the jury, follow and be governed by the laws of the State of Illinois and the practice of the courts of record in said State; to each and every part of which charge upon the facts in said cause, defendants' counsel then and there excepted, as not being in accordance with the laws of said State of Illinois and the practice of the courts of record in said State.

40 The court refused to give to the jury to take to their room, as defendants' counsel had requested, the written instructions given by the court; to which refusal defendants' counsel then and there excepted.

Defendants' counsel also, in apt time, requested the court to allow the jury to take to their room the account-book, freight-bills, and other papers introduced in evidence, other than the depositions, which request

was refused; to which refusal defendants' counsel then and there excepted.

The foregoing shows so much of the evidence introduced by both parties upon the trial, the instructions asked, and of the charge to the jury, as is material or necessary to show the errors assigned by the defendants; and because none of said matters otherwise appear, it is prayed that this bill of exceptions may be signed, sealed, and made a part of the record; and the same is accordingly done.

J. C. HOPKINS,
*U. S. Dist. Judge.*

(Endorsed:) Filed June 13, 1873. W. H. Bradley, Clk.

41 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record of the proceedings had in the cause wherein George B. Burrows, as assignee of the estate and effects of Norton Emmons, a bankrupt, vs. Ira P. Nudd and S. R. Noe, defendants, as the same appears from the records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Chicago, in said district, this 29th day of Sept., A. D. 1873, and of the Independence of the United States the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

42 UNITED STATES OF AMERICA, *ss:*

To George B. Burrows, assignee upon the estate of Norton Emmons, a bankrupt, greeting:

You are hereby cited to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Ira P. Nudd and S. R. Noe are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Given under my hand at the city of Chicago, in the northern district of Illinois, this 31st day of July, A. D. 1873.

H. W. BLODGETT, *Dist. Judge.*

43 Service accepted Aug. 1, 1873.

TENNYS, HOWARD, ABERCROMBIE,
*Plff.'s Attys.*

(Indorsed:) Supreme Court of the United States. Ira P. Nudd & S. R. Noe, plffs. in error, vs. George B. Burrows, deft. in error. Citation.

44 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between

George B. Burrows, assignee of the estate and effects of Norton Emmons, a bankrupt, plaintiff, and Ira P. Nudd and S. R. Noe, defendants, a manifest error hath happened, to the great damage of the said Ira P. Nudd and S. R. Noe, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court
45 of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States, this fourteenth day of June, A. D. eighteen hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

46 (Indorsed:) Circuit court U. S., northern dist. of Illinois. George B. Burrows, assignee, &c., vs. Ira Nudd & S. R. Noe. Writ of error.

(Indorsement on cover:) No. 270. Ira P. Nudd and S. R. Noe, plaintiffs in error, vs. George B. Burrows, assignee of the estate of Norton Emmons, a bankrupt. N. Illinois, C. C. U. S. Filed 16th October, 1873.

IN THE

# SUPREME COURT

OF THE UNITED STATES.

**No. 58.**

**IRA P. NUDD, and S. R. NOE, Plaintiffs in Error,**

—*vs.*—

**GEORGE B. BURROWS, Assignee of the Estate of NORTON EMMONS, a Bankrupt, Defendant in Error.**

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS.*

## Brief and Argument for Plaintiffs in Error.

W. H. SWIFT, Attorney for Plaintiffs in Error.

**W. C. GRANT, of Counsel.**

Beach, Barnard & Co., Legal Printers, 98 Randolph Street.

1875.

IN THE

# SUPREME COURT OF UNITED STATES.

No. 58.

IRA P. NUDD and S. R. NOE,
PLAINTIFFS IN ERROR,
—*vs.*—
GEORGE B. BURROWS, Assignee of the Estate of NORTON EMMONS, a Bankrupt,
DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.


W. H. SWIFT,

ATTORNEY FOR PLAINTIFFS IN ERROR.

W. C. GRANT, OF COUNSEL.



CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 93 RANDOLPH STREET.

1873.

# Statement of Case.

This was an action brought by the plaintiff as assignee of Norton Emmons, a bankrupt, to recover from the defendant the value of certain cattle, sheep, and hogs, and one thousand dollars in money, alleged to have been transferred by said Emmons to the defendants by way of preferential payment, and in fraud of the provisions of the bankrupt act; said Emmons had, for a number of years prior to July 1, 1870, been engaged in the stock business in Wisconsin, purchasing cattle, sheep, and hogs, and shipping them chiefly to the defendants, at Chicago, to sell upon commission. About July 1, 1870, he associated with him one Richard B. Chandler,, and one James W. Chandler, and said parties thenceforth, under the firm name of Emmons & Chandler, continued the same business; also shipping the stock which they bought chiefly to the defendants. The plaintiff claimed that about December 13, 1870, it was arranged between the defendants and the members of said firm of Emmons & Chandler, that said firm should dissolve; that said Emmons should continue the business until January 1, 1871, and should, at the close of the year, buy a large shipment of stock upon credit, which should be shipped to the defendants and sold by them, and the proceeds applied to pay the indebtedness of Emmons & Chandler to the defendants.

The plaintiff further claimed that the said Emmons was at this time insolvent; that said firm of Emmons & Chandler did dissolve about December 13, 1870; that said Emmons did, in the first four days of January, 1871, ship to the defendants nine car loads of cattle, sheep, and hogs; that the defendants sold the same and held the proceeds to pay the indebtedness to them; that the net proceeds of said shipment was $7,553.27; that a large part of the stock which went into this last shipment was paid for by drafts drawn by said Emmons upon the defendants,

which drafts were not accepted or paid by the defendants; that upon the 6th day of January, 1871, said Emmons paid to the defendants one thousand dollars in money. That a petition in bankruptcy was filed against said Emmons in the district court of the United States for the Eastern district of Wisconsin, on the 18th day of February, 1871; on which petition said Emmons was duly adjudicated a bankrupt.

The plantiff also claimed that the defendant, at the time of making said arrangement, namely, on or about December 13, 1870, had reasonable cause to believe said Emmons was insolvent.

The defendants showed that during all the time they had acted as the factors of said Emmons, and said firm of Emmons & Chandler, it had been their usual course of business and their regular practice to advance money to buy stock, relying upon the consignments to be made to them to cover such advances: that they continued to make such advances after December 13, 1870, in the same manner as before, receiving consignments and selling the same to cover their previous advances; that the indebtedness to the defendants at the time of the last shipment of stock was for such advances; that these advances were made by payment of drafts drawn upon the defendants; that the bank business of the firm of Emmons & Chandler was done at the First National Bank of Madison, Wisconsin, in the name of said Emmons alone, as well after the formation of said co-partnership as before that time; that the advances which they had made, both before and after said co-partnership, were made by drafts drawn upon them through said bank, in the name of Norton Emmons alone; that such advances were all made in good faith, and in the usual and ordinary course of business, and relying upon consignments made to them to cover such advances.

The defendants claimed, and introduced testimony tending to show that there was no such arrangement for the payment of the indebtedness to them between the defendants, or either of them, and said firm of Emmons & Chandler, or either of said firm, as was claimed by the plaintiff. Also, that said firm of Emmons & Chandler did not dissolve about December 13, 1870, but con-

tinued, at least, until the time of closing the account with the defendants—January 10, 1871.

Defendants further claimed, and introduced evidence tending to show, that the business was conducted in the same manner, subsequent to December 13, 1870, as before that time; and that they supposed they were still doing business with the firm of Emmons & Chandler up to the time their account with the defendants was closed, and that until such time they knew of nothing from which they could infer the dissolution of said firm. That the last shipments were not, nor was any part of them, sold by the defendants under any arrangement with said Emmons and the Chandlers, or either of them, that the proceeds should be used to close up the account with the defendants; that shipments continued to be made after December 13, 1870, and up to the time of the closing of the account, with one or two exceptions, in the name of Emmons & Chandler, and not in the name or on the account of Emmons alone. That Richard B. Chandler was worth $15,000, or $20,000; that James W. Chandler was a man of small means, but solvent; that if the co-partnership of Emmons & Chandler continued subsequent to December 13, 1870, and up to the time of closing said account, said firm was not insolvent; and that they did not know, at any time prior to the closing of the account, that said Emmons was insolvent, and they had no reasonable cause to believe that he was.

The jury found a verdict for the plaintiff in the sum of $9,729.45, and the court rendered judgment for that amount, together with costs.

The following errors are assigned:

I.

A witness for the plaintiff testified that he was present when Norton Emmons engaged Shumway to work for him; in connection with which testimony, the plaintiff put the following

Q. "What did Emmons say to Shumway, at the time he "engaged?" A. "He said he wanted to make a big ship- "ment this time—that is, he said he thought stock was going "to increase in value, and he said he thought it was a good "time to buy."

Q. "What instruction, if any, did he give him, as to buying "stock?" A. "Nothing particularly, only that he wanted to "get in a big shipment; that he thought it was a good time to "buy, for stock might come up. He told him what prices to "give, and if it was a particularly nice lot, to give a little more: "that he was running the business alone."

Another witness for the plaintiff, testified:

"I had some conversation with Mr. Emmons between Chi- "cago and Oregon, when we were returning together from the "shipment before the last one."

In connection with which testimony, the plaintiff put the following question:

Q. "What did he say in regard to buying stock, during that "conversation?" A. "He said that in the first week in Jan- "uary he wanted to make a large shipment; he wanted to get "in all the stock he could. He said something in regard to my "buying for him. He said he would like to have me buy that "week."

The same witness further testified:

"I had some conversation with Mr. Emmons, at my barn, "about the time that Illingworth made complaint against Em- "mons in the police court; I can't state all the conversation. "He said that Illingworth took him with a warrant, for obtain- "ing goods under false pretences; and he said, 'I am owing "'you, and intend to pay all I owe.'"

In connection with which testimony the plaintiff put the following question:

Q. "What did he say in regard to the Viall note in that con- "versation?" A, "He said that Viall had signed a note with him "as I understood him, at the bank for a thousand dollars. When "he started away—that is, when he went from here to Chicago, "it wasn't paid; that he took $1,000 in his pocket, and took it "to Chicago with him. He found out then from Mr. Nudd that

" the Viall note or draft, or whatever it was, had been paid; that " he paid the money over to Mr. Nudd; that he had no money of " any account; that he might as well have kept that thousand " dollars as not. That was about all there was about the Viall " note. That Mr. Viall was a friend of his, and he was bound " to see him protected, as he was all of his friends; that there " was no man or friend that he owed but what he would see " them paid as soon as he could pay them. This conversation " grew out of his application to me to go his bail in the Illing- " worth suit, and to come up as a witness, which I did."

Whereupon the plaintiff put the following question:

Q. " State whether or not, in this conversation, in speaking " of taking that $1,000 with him to Chicago for the protection " of Mr. Viall, that one reason for his doing so was that he " didn't know but Nudd might shut down upon him, or words " to that effect." A. " That was his reason for taking it. " He had got to have a settlement with Nudd, and he did'nt " know when he started whether Nudd would let him run " any longer or not."

A witness for the plaintiff testified that he bought some part of the stock for the last shipment. In connection with which testimony the plaintiff asked him the following questions:

Q. " What instructions, if any, did he, Emmons, give you, " with regard to purchasing stock for that shipment?" A. "I was " to buy them; any way to buy them; anything so that nobody " would mistrust I was paying too much; and pass off his drafts " on I. P. Nudd to pay for them."

Q. " What, if anything, did he say as to the amount of " money to be used?." A. " He said it would take quite a large " amount of good money to pass off quite a small amount of " counterfeit money. The idea was here: He meant that if " folks came and wanted money for their cattle, to pay them " the money, but if I could shove off these drafts on them, why " to do it."

To each of these questions, and to the answers thereto, defendants' counsel objected, on the ground that they called for declarations of Emmons not made in the presence of either of the defendants, or brought to their knowledge. The objection

was overruled by the court, and the testimony admitted, and each and all of these rulings of the court are assigned for error.

II.

A witness for the defendants testified that the partnership between Emmons and the two Chandlers continued until some time in January, 1871.

In connection with this testimony, defendants' counsel put the following questions:

Q. "What, if anything, did Richard Chandler say to you "after the 13th of December, respecting his being interested in "the firm carried on in the name of Norton Emmons?"

Plaintiff's counsel objected to the question, and the objection was sustained.

A witness for the defendants testified that James W. Chandler frequently came to Chicago after December 13, 1870, in charge of the consignments of stock.

In connection with this testimony, the defendants' counsel put the following question:

Q. "What was said, if anything, respecting the sale or "prices at which stock should be sold?"

Plaintiff's counsel objected to the question. The objection was sustained.

At the same time, plaintiff's counsel objected generally to the admission of any declarations of James W. Chandler. The court sustained the objection, and refused to admit any of the declarations. To each of these rulings of the court defendants' counsel then and there excepted, and each of these rulings is assigned for error.

III.

Before the court charged the jury, and in apt time, defendants' counsel requested the court to, in all respects in each charge, be governed by and follow the practice of courts of record in the

State of Illinois, and the laws of the State of Illinois, applying to such matters, but the court refused to follow such practice and such law; to which refusal defendants' counsel then and there excepted. This refusal of the court is assigned for error.

## IV.

Defendants' counsel prepared in writing the following instruction, and requested the court to give the same to the jury, and to deliver it to them to take with them to their room :

" If the jury believe, from the evidence, that either R. B. or " J. W. Chandler was a partner of Norton Emmons, subsequent " to the 13th of December, 1870, and remained so until the " settlement of account with defendants, and as such partner or " partners, was or were interested in the dealings with the defen- " dants, subsequent to that date, they are instructed that in " such case, the plaintiff cannot maintain this suit."

The court read the instruction to the jury, but commented upon it, as follows :

" I have charged you as requested by the defendants' counsel, " that if this debt on the part of the defendants, was against " Emmons and the Chandlers, or either of them, the plaintiff " cannot recover. * * * On the main question, which covers " most of the property, I shall not occupy much time. The " evidence to establish it rests in writing, under the defendants' " own signature. By the defendants' books, it appears that the " partnership account of Emmons & Co. was settled and bal- " ance transferred upon their books to the individual account of " Norton Emmons, on the 13th of December; that after that it " was kept with him alone, and the defendants did not pay any " amount to the Chandlers, without an order from Emmons, and " in addition to this, they signed a receipt, release or declaration " as follows: 'Chicago, December 13, 1870. To whom it " 'may concern: This certifies that whereas, Mr. R. B. Chan- " 'dler has been a joint partner with Norton Emmons, from the " '1st day of July, 1870, to date, we release him from any fur-

" 'ther obligation that may be transacted between us and
" 'Norton Emmons, and look to Norton Emmons only for bal-
" 'ance of present account, and all business that may hereafter be
" 'transacted with him. The above release of R. B. Chandler,
" 'is made by the consent of all parties.' That would seem to
" settle all controversy upon this question. That matter having
" been so carefully reduced to writing by the defendants, at the
" time, or soon after, while the matter was fresh in their mem-
" ory, it would seem most remarkable, to allow them now to
" swear it away. The book and the release show that they
" agreed to deal thereafter with Emmons, and released Chandler
" altogether, and did so on their books. So far as Chandler and
" Emmons are concerned, it was an individual matter with them,
" but, as the assignee represents Emmons' right, and is entitled
" to the benefits under his contract, as to him, it would be very
" remarkable that they could, in view of these entries, and the
" statement or release, be allowed to set up that he was still a
" partner in interest as to that. Written testimony is much
" stronger than parol; it is like a disputed case in regard to the
" boundaries of real estate, in which a government boundary is
" discovered; it generally disposes of the dispute, and outweighs
" ordinarily, any amount of verbal testimony, depending upon
" the recollection of witnesses, particularly interested parties and
" witnesses. Nudd says, he drew the release, but says he did
" not draw it until in January, after that date. The time when
" it was drawn, is quite immaterial. It declares the fact that
" they did business with Emmons alone, and if that is so, that
" disposes of the defense on that ground.

" There is some testimony that the receipt was given to
" Chandler, on the 13th. Emmons says that he heard him say
" he had a receipt when he returned home. If you are satisfied
" that the receipt was made at the time it bears date, or after-
" wards, with a view to furnishing evidence to release Chan-
" dler from the 13th, and as stating the true condition of their
" affairs, I think you will be justified in finding that the transac-
" tion of the parties was not as stated in the books of the de-
" fendants, and this release or declaration, and it would be un-
" safe to reject written evidence of that character, upon evidence

" of interested parties." To which modifications and comments, and to all that portion of the charge above given, except what was requested by defendants' counsel, defendants' counsel then and there excepted, and such modifications and comments, and those portions of the charge above given, not requested by defendants' counsel, are assigned for error.

## V.

Defendant's counsel also prepared the following written instruction, and requested the Court to give the same to the jury, and to deliver it to them, to take with them to their room:

" If the jury believe, from the evidence, that the defendants " advanced money to Norton Emmons, to buy stock to be con- " signed to them, relying upon those consignments for the re- " payment of those advances, they are instructed that, in such " case, the defendants would have a lien upon such coosignments " for such advances, as soon as the same came to their posses- " sion, even if the defendants knew, at the time of making such " advances, that Emmons was insolvent."

The court gave this instruction, but modified the same, and commented thereon as follows:

" The books of account of defendants, read in evidence, toge- " ther with the testimony, tend to show that the defendants had " been advancing the bankrupt money, from time to time, after " the 13th of December, and that, on the 31st day of Decem- " ber, 1870, the time of the last item of account, the bankrupt " was owing to them the sum of $8,553.87. This money, it is " claimed, was advanced by defendants, who were stock brok- " ers and general commission men in this city, engaged in the " business of receiving stock, cattle and hogs, making advances " thereon, and selling for the benefit of shippers. They state " that their ordinary mode of doing business was not to pay " drafts drawn by their country customers or consignors, until " after the receipt of stock; but in this case, they permitted the " bankrupt to draw and obtain the money to use in buying

" stock. When that stock was received and sold, they credited " his account with the proceeds, and such appears to have been " the way they dealt with the bankrupt, so that he had over- " drawn his shipments on the first day of January, in the sum of " $8,553.87, above stated. This being the mode of business " pursued, as I understand to be stated, I think it would con- " stitute the relation of debtor and creditor between the bank- " rupt and the defendants; that he in law and fact was owing, " on the first of January, to the amount above stated, which " was unsecured at that time; that the advances did not create " a lien on such stock, purchased with the money advanced or " loaned for that purpose, until the bankrupt had actually ship- " ped them to the defendants. As I have charged you, at " the request of the defendants' counsel, that the lien of the de- " fendants did not attach, until the actual receipt of the stock by " the defendants, such being the law, the subsequent receipt of " stock and appropriation of the avails to the payment of the " debts due them, would be void as a preferential payment, " provided the other facts hereinafter mentioned are found to " have existed, by which I mean to be understood that if the " transactions between the parties were as I have before stated " them, they would constitute the relation of debtor and creditor, " and bring their debt under the provisions of the bankrupt act, " the same as any other debt."

To which modifications, and comments, and all such portion of said charge defendants' counsel then and there excepted, and all such portion of said charge is assigned for error.

## VI.

The court refused to give to the jury written instructions to take to their room as defendants' counsel had requested. This refusal is assigned for error.

VII.

The court charged the jury upon the facts in the case, notwithstanding that defendants' counsel, in apt time, requested that the court would, in charging the jury, follow and be governed by the laws of the State of Illinois, and the practice of courts of record of said State; and to each and every part of said charge which was upon the facts in the case, defendants' counsel then and there excepted, as well as to those parts of the charge which are above given.

VIII.

Defendants' counsel, in apt time, requested the court to allow the jury to take to their room the account book, freight bills, and other papers introduced in evidence, other than the depositions, in accordance with the laws of the State of Illinois and the practice in the courts of record in said State, which request was refused; to which refusal defendants' counsel then and there excepted, and such refusal is assigned for error.

IX.

It is also assigned for error that the amount of the judgment rendered is excessive.

# BRIEF.

## I.

A witness for the defendants testified that the partnership between Emmons, Richard B. Chandler and James W. Chandler continued until some time in January, 1871. (Record, p. 32.) To this witness counsel for defendants put the question, "What, "if anything, did Richard Chandler say to you after the 13th of "December, respecting his being interested in the firm carried "on in the name of Norton Emmons?" To which plaintiff's counsel objected, and the objection was sustained by the court. (Record, p. 32.)

A witness for the defendants testified that James W. Chandler frequently came to Chicago after December 13, 1870, in charge of the consignments of stock. (Record, p. 32.) In connection with this testimony, defendants' counsel asked the witness "What was said, if anything, respecting the sale, or prices at "which stock should be sold?" Plaintiff's counsel objected, and the objection was sustained by the court. (Record, p. 33.)

Plaintiff's counsel then objected to the admission of any declarations of James W. Chandler, and the court sustained the objection. (Record, p. 33.) In each and all of these rulings the court erred.

The question whether or not either of the Chandlers continued in partnership with Emmons up to the time of the closing of the account with the plaintiffs, was material. If answered in the affirmative, the action could not be sustained. That Emmons and the two Chandlers had been in co-partnership for a considerable time prior to December 13, 1870, was admitted by both sides. (Record, pp. 18 and 28.)

This state of things being admitted to have existed prior to

December 13, 1870, there arises a presumption that it continued subsequent to that time.

Phillipps on Ev., Vol. 1, *640.

This presumption the plaintiff sought to overthrow by evidence tending to show that the co-partnership dissolved by agreement on December 13, 1870. (Record, p. 19.) The defendants introduced evidence tending to show that the co-partnership continued until the closing of the defendants' account, January 10, 1871. (Record, pp. 29, 30 and 32.)

(*a.*) Even if the co-partnership dissolved on December 13, 1870, so far as new business was concerned, it continued, so far as their liability to the defendants was concerned, until that liability was discharged, and by their acts done and declarations made in connection with discharging this liability, they would continue to bind each other as if there had been no dissolution.

Phillipps on Ev., Vol. 1, *498.
*Cady* v. *Shepherd*, 11 Pick., 407, 408.
*McIntire* v. *Oliver*, 2 Hawks, (N. C.), 209.
*Gardner* v. *Towsey*, 3 Litt., (Ky.), 425.

The defendants introduced evidence tending to show that they had no notice and no knowledge of any dissolution. (Record, p. 31.)

(*b.*) The plaintiff claimed that the co-partnership was dissolved by agreement; that is to say, by acts and declarations of the two Chandlers; and the defendants had a right to show subsequent contradictory acts and declarations by them, for the purpose of impeaching this testimony on behalf of the plaintiff, if for no other purpose.

(*c.*) The plaintiff claimed that the two Chandlers and Emmons made a certain agreement concerning the manner in which their liability to the defendants was to be paid, and that the time of its execution extended from December 13, 1870, to January 10, 1871. Then anything done or said by either of the parties

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during this time, in connection with this agreement and its execution, was admissible as a part of the *res gestæ*.

Phillipps on Ev., Vol. 1, *185.
*Pool* v. *Bridges*, 4 Pick., 378.
*Richardson* v. *Cato*, 10 Humph., 138.
*Nelson* v. *Iverson*, 24 Ala., 9.
*Barnes* v. *Mobley*, 21 Ala., 232.
*Stansbury* v. *Arkwright*, 5 Car. and P., 575.
*Allen* v. *Duncan*, 11 Pick., 310.
*Boyden* v. *Moore*, 11 Pick., 362.

It may be observed in this connection, that if the two Chandlers made any declarations, subsequent to December 13, 1870, tending to show that their co-partnership with Emmons still continued, these declarations were contrary to their interest.

(*d.*) Evidence *aliunde* having been given by the defendants, tending to show that the co-partnership continued subsequent to December 13, 1870, the court should have admitted the declarations of the two Chandlers to go to the jury with the other evidence.

*Nicholls* v. *Dowding*, 1 Starkie, 81.

The defendants had introduced testimony that the co-partnership continued until January 10, 1871; that shipments continued to be made to them subsequent to December 13, 1870, in the old firm name of "Emmons & Chandler," and that James W. Chandler frequently came to Chicago after December 13, 1870, in charge of these consignments of stock. (Record, pp. 29, 30, 31 and 32.)

(*e.*) Certainly, whatever James W. Chandler said about the price to be obtained for the consignments of stock with which he came, was admissible. If he was himself fixing the price, it was an act of ownership, not a declaration. Inasmuch as he had the stock in his possession, and was taking it to market, the directions he gave about it are admissible, as part of the *res gestæ* to show under what title he was in possession.

*Willies* v. *Farley*, 3 Car. & P., 395.
*Adams* v. *Davidson*, 10 N. Y., 309.
*Stewart* v. *Hanson*, 35 Me., 506.

(*f.*) If James W. Chandler was taking the stock to market, as the agent of Emmons what he said about the price at which it was to be sold was a declaration within the line of his agency, and was admissible as a part of the *res gestæ*. It was material in this view also, aside from the question of co-partnership, because the plaintiff had introduced evidence tending to show that this stock was to be bought and sold with but little reference to the price.

(*g.*) The court undoubtedly erred in refusing to admit *any declarations* of James W. Chandler, inasmuch as the plaintiff admitted that he was a partner prior to December 13, 1870, (Rec., p. 19,) and this ruling excluded his declarations made prior to that time.

(*h.*) The fact that the Chandlers were not parties to the suit, was not sufficient to sustain the rulings of the court, inasmuch as the suit involved matters concerning which they certainly, at one time, had a mutual interest with Emmons.

Greenleaf on Ev., Vol. 1, § 181.
Phillipps on Ev., Vol. 1, *498.
*Clay* v. *Langslow*, 1 Mood. & Malk., 45.
*Howard* v. *Cobb*, 3 Day, 309.
*Adams* v. *Brownson*, 1 Tyler, 452.
*Fisk* v. *Copeland*, 1 Tenn., 383.

In presenting these points, we have taken it for granted that, so far as these questions are concerned, the assignee occupies as good a position as Emmons himself would do, if he could maintain the action. But does he occupy as good a position?

## II.

Defendants' counsel, in apt time, requested the court in charging the jury, to follow the practice of courts of record of the State of Illinois, and the laws of the State of Illinois applying to such matters. The court refused to follow such practice and such law. (Record, p. 33.)

Notwithstanding said request of defendants' counsel, and their objections made in proper time, the court charged the jury upon the facts in the cause, contrary to the laws of the State of Illinois and to the practice of the courts of record of said State. (Record, pp. 34 to 40.)

Defendants' counsel also requested the court to reduce his instructions to the jury to writing and give them to the jury to take to their room; also to allow the jury to take to their room the account-book, freight-bill and other papers introduced in evidence, other than the depositions, in accordance with the laws of the State of Illinois, and the practice of the courts of record of such State, but the court refused to grant either of said requests. (Record, p. 40.)

In each of these rulings the court erred.

By act of June 1, 1872, Congress declared that "The practice, "pleadings and forms and modes of proceeding in civil causes, "other than equity and admiralty causes, in the circuit and dis- "trict courts, shall conform, as near as may be, to the practice, "pleadings and forms and modes of proceeding existing at the "time in like causes in the courts of record of the State within "which such circuit or district courts are held, any rule of court "to the contrary notwithstanding."

Rev. Stats. U. S., § 914.

The practice and mode of proceeding then existing in like causes in the State of Illinois, were fixed by statutes which had then been many years in force, and which provide as follows:

"The court, in charging the jury, shall only instruct as to the "law of the case."

Gross' Stats. Ills., Vol. 2, Chapt. 83, § 139.

"Hereafter, no judge shall instruct the petit jury in any case, "civil or criminal, unless such instructions are reduced to "writing."

Ibid., § 140.

"And when instructions are asked which the judge cannot "give he shall, on the margin thereof, write the word 'refused;' "and such as he approves, he shall write on the margin thereof "the word 'given'; and he shall in no case, after instructions

"are given, qualify, modify or in any manner explain the same "to the jury, otherwise than in writing."

Ibid, § 141.

"And such instructions, so given, shall be taken by the jury "in their retirement, and returned by them, with their verdict, "into court."

Ibid, § 142.

"Papers read in evidence, other than depositions, may be car- "ried from the bar by the jury."

Ibid, § 143.

The practice of the courts of record of the State of Illinois in like causes is well settled.

The instructions must be in writing.

*Bloomer* v. *Sherrill*, 11 Ill., 483.
*Ray* v. *Wooters*, 19 Ill., 82.

The court must not charge upon the facts.

*Eames* v. *Blackhart*, 12 Ill., 195.
*Sherman* v. *Dutch*, 16 Ill., 283.
*Wall* v. *Goodenough*, Ibid, 415.
*Seaverns* v. *Tribley*, 48 Ill., 195.

Papers and books introduced in evidence may be taken by the jury to their room.

*Hovey* v. *Thompson*, 37 Ill., 538.

The court admits that he did charge the jury upon the facts in the case. (Record, p. 39.) It also plainly appears that he did, from those portions of the charge given upon pages of the record 35 to 39, inclusive. He not only charges them upon the facts, but the question whether either of the Chandlers remained in co-partnership with Emmons subsequent to December 13, 1870, which was purely a question of fact, and a very material question, he virtually withdraws from the jury, and decides adversely to the defendants.

## III.

The court erred in the instruction given upon the question of co-partnership. The plaintiff introduced a document, dated December 13, 1870, and signed by the defendants, purporting to release R. B. Chandler; which document is given in full in the charge. (Record, p. 35.) The defendants testified that this document was not given until about the middle of January, 1871, after their account was closed; that it was ante-dated at the request of R. B. Chandler, and was given unhesitatingly, and with but little inquiry into Chandler's reasons for wishing the same ante-dated, because at the time at which it was actually given their account had been paid in full. (Record, pp. 30, 31.)

The court, in effect, charged the jury that this document would operate as an estoppel upon the defendants, and that they were prevented from denying that it was given at the time of its date, December 13, 1870.

Speaking of this release, the court charges the jury: "That "would seem to settle all controversy upon this question; that "matter having been so carefully reduced to writing by the "defendants at the time, or soon after, while the matter was "fresh in their memory, it would seem most remarkable now, "to allow them to swear it away. * * * Written testimony "is much stronger than parol; it is like a disputed case in regard "to the boundaries of real estate in which a government bound- "ary is discovered. It generally disposes of the dispute, and "outweighs, ordinarily, any amount of verbal testimony depend- "ing upon the recollection of witnesses, particularly interested "parties and witnesses. Nudd says he drew the release, but "he says he did not draw it until after that date, in January. The "time when it was drawn is quite immaterial. * * * If you "are satisfied that the receipt was made at the time it bears "date, or afterwards, with a view to furnishing evidence to re- "lease Chandler from the 13th, and as stating the true condition "of their affairs, I hardly think that you will be justified in "finding that the transaction between the parties was not as "stated in the books of the defendants and this release or dec-

" laration, and it would be unsafe to reject written evidence of " that character upon the evidence of interested parties."

Whenever this receipt or release was given it could not operate as an estoppel upon the defendants, for neither Norton Emmons, nor any creditor whom the assignee represented, could by it have been led into any different position from that which he would otherwise have occupied. Nor does it appear that either of the creditors of Norton Emmons ever saw this receipt or release, nor that the action of either of such creditors, nor of Norton Emmons himself, was in any manner influenced thereby. Certainly, the defendants were not estopped from denying that it was given upon December 13, 1870; and if not, then the court was certainly in error in saying "the time when it was drawn " was quite immaterial." There was nothing in the case to dispute the testimony of the defendants that the receipt was given in the middle of January, instead of at the time that it bears date. The charge of the court upon this point is virtually a direction to the jury that, so far as this case was concerned, they must find that Emmons and the Chandlers dissolved upon December 13th. This would not follow, even if the receipt or release were so strong as to operate as an estoppel, for it only applies to R. B. Chandler; and if J. W. Chandler remained in the firm up to the time of the closing of defendants' account, the action could not be maintained. This question of the continuance of the co-partnership was a material one. If a preference is given by a firm of which only one member subsequently goes into bankruptcy, such preference cannot be avoided by the assignee of the bankrupt partner.

*Forsaith* v. *Merritt*, 3 N. B. R., 48.
*In re Shepard*, 3 N. B. R., 172.
*Withrow* v. *Fowler*, 7 N. B. R., 339.

## IV.

The court erred in his instruction upon the question of a factor's lien. The advances made by the defendants were not made upon the personal credit of Emmons, or of the firm of

Emmons & Chandler. They were made in reliance upon consignments that were to be made immediately after, and to cover such advances; this had been the uniform course of business between the defendants and Emmons, and the firm of Emmons & Chandler. (Record, pp. 28, 29.) What their course of business had been in dealing with other customers is immaterial. There is no question that if the defendants had paid to Emmons, or Emmons & Chandler, certain sums of money, subsequent to December 13, 1870, for purchases made in the ordinary course of business, such purchases would have been protected by the bankrupt act, notwithstanding several days or weeks had elapsed between the payment of the money and the delivery of the stock; or if the defendants had loaned such sums of money to Emmons, or Emmons & Chandler, upon the agreement that the same should be secured by mortgage, there is no doubt but that the bankrupt act would respect such transaction, though a considerable time had intervened between the payment of the money and the perfection of the security; and this, notwithstanding that the defendants knew at the time they made such purchase, or loan, that said Emmons, or Emmons & Chandler, were insolvent. The delivery of stock upon such purchase, or perfection of security upon such agreement or loan, would not be considered a preference, or fraud upon creditors, within any of the provisions of the bankrupt act. These transactions are of the same nature. It appears, (Record, p. 22), that between December 13, 1870, and January 1, 1871, the defendants advanced $19,324.79; all of which was advanced in the usual course of business, and was to be covered by consignments to be almost immediately made. In pursuance of the agreement under which the money was advanced, the consignments were made, and the advances protected. But for the reliance which the defendants placed upon the consignments to be made, no part of these advances would have been made; and inasmuch as upon December 13, 1870, the indebtedness to these defendants amounted only to $1,617.43, (Record, p. 22), the estate of Norton Emmons has received $8,112.02, being the difference between the indebtedness of December 13, 1870, and the amount of the judgment rendered, no part of which it would have obtained but for the reliance of

the defendants upon these consignments to be made. Says Mr. Justice PARKE, in *Fisher* v. *Miller*, (1 Bing., 150): "A person "who obtains money unedr an agreement cannot afterwards go "behind the back of the lender, so as to deprive him of the "security stipulated for, and agreed on at the time of the ad- "vance."

The bankrupt estate is in no worse condition, if the defendants are allowed to retain the proceeds of these consignments, than it would have been if the defendants had never made the advances in reliance upon these consignments; while, to sustain the judgment in this case, is to allow the estate to be enriched at the expense of these defendants, who never relied upon the personal credit of either Emmons or the Chandlers. This certainly seems inequitable. See, also,

*Anderson* v. *Clark*, 2 Bing., 20.
*Haile* v. *Smith*, 1 B. & P., 563.

A factor's lien for advances is not defeated by knowledge of his principal's insolvency.

Parsons on Cont's, Vol. 3, 260.
*Foxcroft* v. *Devonshire*, 2 Burrows, 931.

As for the one thousand dollars, which was paid in cash, if the defendants had a valid lien upon the stock which had been consigned, Emmons had the right to pay the money, to apply upon the lien, even though he contemplated bankruptcy.

Hunt's Law of Fraudulent Conv., 157.
*Mavor* v. *Croome*, 1 Bing., 261.
*Marshall* v. *Lamb*, 5 Q. B.
(Patterson, J.), *p. 125.
*Thompson* v. *Beatson*, 1 Bing., 145.

## V.

Certainly the amount of the judgment rendered was excessive. The plaintiff should not have been allowed in any event, to recover more than the amount of the indebtedness of December 13, 1870, namely: $1,617.43. Even if the plaintiff's theory

of the case was sustained, it would only show that about that time, the defendants and Emmons, and the Chandlers, made an arrangement for the purpose of paying the amount of their then indebtedness to the defendants, at the expense of other creditors.

This action was not brought for a conspiracy, nor could such an action be maintained by the assignee of Emmons. It was brought simply, to recover back what had been obtained by way of preference; and certainly, at the most, it cannot be shown that the defendants obtained, by way of preference, any more than the amount due to them upon December 13, 1870. Whatever character may be attached to their advances made prior to that date, there can be no question, that those made subsequent to that date, were made in immediate reliance upon the consignment of stock; and if the defendants refunded to the estate the amount of the indebtedness to them, upon December 13th, the estate would be in as good condition as if no arrangement or agreement for preference had ever been made. The assignee can ask nothing more than this, and he cannot be sustained in the recovery of anything more than this.

Respectfully submitted.

W. H. SWIFT,

*Att'y for Plaintiff in Error.*

W. C. GRANT,

*Of Counsel.*

# Supreme Court of United States.

No. 270.

*IRA P. NUDD and S. R. NOE,*
*Plaintiffs in Error,*

*vs.*

*GEORGE B. BURROWS, Assignee of the Estate of* NORTON EMMONS, *a Bankrupt,*
*Defendant in Error.*

*In Error to the Circuit Court of the United States, for the Northern District of Illinois*

H. W. TENNEY, CHICAGO, ILL.,
H. M. LEWIS, } MADISON, WIS.,
J. C. McKENNEY, }
*Counsel for Defendant in Error.*

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*In Error to the Circuit Court of the United States, for the Northern District of Illinois.*

I.

This was an action brought by the defendant in error, as the assignee of one Norton Emmons, a bankrupt, against the plaintiffs in error, in the Circuit Court of the United States for the Northern District of Illinois, to recover the net proceeds of about eleven car loads of live stock and dressed hogs, shipped by the bankrupt to the plaintiffs in error, and one thousand dollars in money, paid by the said bankrupt to said plaintiffs in error, and which proceeds and money paid had been applied by the plaintiffs in error to the payment of an indebtedness from the bankrupt to them, in fraud, as contended by the defendant in error, of the provisions of the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and in which action judgment was rendered in favor of said defendant in error, as such assignee, against said

plaintiffs in error, on the 13th day of June, 1873, for the sum of nine thousand, seven hundred and twenty-nine dollars and forty-seven cents, damages, and costs, to reverse which the case is brought to this Court, for review.

II.

There is no assignment of errors in the printed transcript of the case, and counsel for defendant in error are not advised as to whether all the exceptions noted in the transcript will be assigned and urged before this Court as causes for reversal.

The first exceptions noted are to questions and answers found upon pages 8 and 9 of the printed transcript.

*First.* It was necessary and material to show in that action, to enable the assignee, the defendant in error, to recover, that Emmons, the bankrupt, was insolvent, or acting in contemplation of insolvency or bankruptcy, and with a view to give such preference.

> Sec. 35 and 39, act of March 2, 1867.
> Bump on Bankruptcy (6th edition), page 538 and cases cited.

It was proper, in order to show that Emmons was acting in contemplation of insolvency and with a view to give the plaintiffs in error a preference over his other creditors, to give in evidence his acts and declarations at or just before the time of making the consignment. It was one of the necessary facts to be found by the jury to enable them to render a verdict in favor of the assignee, and it was not in this view necessary to bring home to the knowledge of the plaintiffs in error, these acts or declarations of the bankrupt, to make the testimony pertinent and legitimate.

It was only necessary for the defendant in error, the assignee, to prove, by proper testimony, after establishing the insolvency of Emmons, or that he was acting in contemplation of insolvency and with a view to give the plaintiffs in error a preference, to prove that the plaintiffs in error knew, or had reasonable cause to believe, at that time, that he was insolvent, or

acting in contemplation of insolvency; and the latter proposition might to be established by other independent facts brought to the knowledge of Nudd & Co., the said plaintiffs in error.

The questions, and answers elicited thereby, had a direct tendency to prove that Emmons was acting, at the time, in contemplation of insolvency and bankruptcy, by showing:

1. That he desired to make a large shipment at that time, (Jan. 1, 1871), and was reckless as to the price to be paid.

2. That in buying the shipment he desired to use as little money as possible, and to buy where he could upon credit; tending to prove that he was under financial embarrassment.

3. That he desired to change, or transfer, the debt he was owing to the plaintiffs in error, to other parties.

4. That he was anxious and solicitous to protect his friend, Viall, who had signed or indorsed his paper, from the anticipated consequences of the plaintiffs in error "shutting down upon him."

5. That he retained the $1,000 for the purpose of preferring his friend, Viall, if necessary, and when he found that the Viall note had been taken care of, he chose to prefer the plaintiffs in error to his other creditors, and paid it to them.

6. It had a tendency to prove that he was apprehensive that his drafts upon Nudd & Co., would not be accepted or paid.

If his intentions had been legitimate and according to the usual course of business, he would only have been solicitous that his buyers should pay such prices as the market would bear, and that they should have paid money for the stock; and contented himself with the legitimate profits, if any, to be applied in extinguishment of his indebtedness to Nudd & Co.

*Second.* In another aspect of the case, the questions and answers were pertinent and legitimate.

The defendant in error, as appears by the printed transcript (page 7), introduced testimony tending to show that said bankrupt, Emmons, R. B. Chandler and the plaintiffs in error, had, prior to December 13, 1870, formed an agreement, or conspiracy, in which they had agreed that the firm of Emmons & Chandler should be dissolved; the indebtedness of Emmons & Chandler,

amounting then to from $4,000 to $5,000, should be transferred, on the books of Nudd & Co., to the individual account of Emmons, the bankrupt, and the plaintiffs in error should release R. B. Chandler from liability to them thereon; and the said Emmons was to continue business in his own name, until the first of January, 1871, when he was to make as large a shipment of stock as possible, to be paid for whenever practicable, by drafts drawn by him upon the plaintiffs in error, which were not to be accepted or paid by the plaintiffs in error, and the stock consigned to the plaintiffs in error to be sold by them, and the proceeds used to balance their account with Emmons.

As the bill of exceptions does not contain all the testimony in the case, nor purport to, it must be presumed that legitimate testimony had been offered to prove the existence of such an agreement, or conspiracy, as indicated on page 7, before referred to.

A part of the testimony under consideration had a direct tendency to establish the fact of such a conspiracy, and to prove overt acts in furtherance of it.

When a conspiracy is formed to do an illegal act, or to commit a fraud, the acts or declarations of any of the conspirators may be given in evidence, although not done or spoken in the presence of the others, or even brought to their knowledge.

1 Greenleaf on Evidence, sec. 111.
3 Greenleaf on Evidence, sec. 94.
American Fur Co. vs. U. S., 2 Peters, 358, 365.
U. S. vs. Cole, 5 McLean, 513.
Page vs. Parker, 43 N. H., 363; 10 Pick., 497.

A conspiracy of that kind, which would make their acts fraudulent and illegal at common law, would certainly make them a fraud and void under the bankrupt act, when shown that a scheme had been devised by them to pay one creditor at the expense of, and by a fraud upon, the others.

Sec. 14 act March 2, 1867.
Bump on Bankruptcy (6th edition), page 382 and cases cited.

*Third.* The objection to the question in folio 32, page 11 of the printed transcript, calling for the declarations or statements

of Richard B. Chandler, was correctly sustained, for obvious reasons:

1. He was himself a competent witness, and could have been called as a witness for the plaintiffs in error.

2. It was hearsay testimony, and no reason was given, or offered, for not calling Mr. Chandler himself, or for resorting to secondary evidence.

1 Greenleaf on Evidence, sec 124.

The same reason applies to sustaining the objection to the question calling for declarations from James W. Chandler, (folio 33, same page), and for the additional reason that the question was immaterial.

III.

It is not our purpose to submit an argument upon the exceptions in folio 33, page 11 of the printed transcript, "that the counsel for plaintiffs in error requested the Court to, in all respects in his charge to the jury, be governed by and to follow the practice of Courts of record of the State of Illinois, and the laws of Illinois applying to such matters, but that the Court refused to follow such practice and such law;" nor to cite the numerous decisions of this Court, bearing upon the subject, to ascertain how far the Federal Courts are to be governed in their practice by the statutes of the several states, under section 5 of the act of Congress approved June 1, 1872; knowing that that this Court is so familiar with the question involved in the exception under consideration, that we are willing to leave the matter to its judgment, without attempting, upon our part, to aid it in its conclusions, but contenting ourselves with the following suggestions:

1. The exception is insufficient in not stating wherein the Court did not proceed according to the practice of the Courts of record in, and the laws of, the State of Illinois.

2. That the intent and meaning of the 5th section of the act approved June 1, 1872, is to make the process, pleadings and proceedings conform, as near as may be, to the practice of the State Courts, and was intended rather for the convenience

of the attorneys of the several states, and to save them the trouble of learning, and practising under, two different systems, than that, by state enactments, additional burdens and duties should be imposed upon judges of the Federal Courts.

3. The exceptions are to matters of form, and not of substance.

It has been the practice of Courts, from the most ancient times, to commit the evidence and the instructions of the Court to the memory of the jury, and with results satisfactory to the administration of justice, both in this country and in England, and there can be no claim made that the plaintiffs in error were prejudiced by the action of the Court in the premises. It has, we believe, never been the practice of the Circuit Judges, or of the Justices of this Court, while presiding at the Circuits, to follow the state laws in this respect.

4. The Court did not instruct the jury as to the facts, but confined its instructions to the legal propositions involved.

Goddard vs. Foster, 17 Wall, 123.
Still vs. Huidekopers, 17 Wall, 384.
Johnson vs. McLain, Hempst, 59.
Carver vs. Astor, 4 Pet., 1.
Evans vs. Eaton, 7 Wheat., 356, 426.
Garrard vs. Reynolds, 4 How., 123.
Games vs. Dunn, 14 Pet., 322.

## IV.

In considering the instructions of the Court relating to the lien claimed by the plaintiffs in error, as factors or brokers, and as to the law governing the transaction, (page 13, printed case), we can obtain but little aid from authorities in this country, the precise questions seeming to have never been adjudicated in the United States, and there are but few cases in England where the qnestions involved have been discussed or decided.

The facts disclosed by the record upon which the decision of this Court must be based, may be summarized as follows:

1. The plaintiffs in error were stock brokers and commission men, doing business in the city of Chicago, engaged in the business of receiving stock, cattle and hogs, making advances

thereon and selling for the benefit of the shippers; ordinarily not paying the drafts drawn by their country customers or consignees, until the receipt of the stock; but in their dealings with the bankrupt Emmons, they permitted him to draw and obtain the money to use in buying stock, and had previous to the first of January, 1871, usually paid such drafts without regard to the receipt of the consignment, but when consignments were received and sold, they credited him with the proceeds, and he was indebted to them, upon balance of account, January 1, 1871, $8,553.87, which was wholly unsecured, and a portion had been due for a long time.

2. Of the consignment or shipment, made by the bankrupt to the plaintiffs in error in the first week in January, and the net proceeds of the sale of which, amounting to $7553.27, was applied by the plaintiffs in error to the payment of the bankrupt's indebtedness to them, $4,000 or more, was purchased by the bankrupt upon credit and not with money advanced by the plaintiffs in error, and the stock so bought upon credit was commingled with that not bought upon credit, and the proceeds of the sale of all, applied, as aforesaid, without discrimination.

3. The presumptions of law are in favor of the regularity of judgments, and that all facts necessary to sustain the verdict were proved by competent testimony, unless the contrary is shown by the bill of exceptions, it must therefore, we think, be assumed for the purposes of this case before this court, that it was duly proved that the bankrupt, Norton Emmons, before said shipment was made and money paid, and before the same came into the possession and custody of the plaintiffs in error, was insolvent and had committed acts of bankruptcy, and that the plaintiffs in error knew it, or had reasonable cause for believing it.

Ventress vs. Smith, 10 Pet. 161.
Coffee vs. Planters' Bank of Tennessee, 13 How. 183
Hipburn vs. Dubois 12 Pet. 345.
Wiley vs. Robinson, Hempst 41.
Hyde vs. Booraem, 16 Pet. 169.
Minor vs. Tillotson, 2 How. 392.
Newell vs. Norton, 3 Wall. 257.

The indebtedness of the bankrupt, Emmons, to the plaintiffs in error on the 1st of January 1871, stood upon the same footing as that of any other unsecured creditor.

They had a present legal remedy against him, and could have sued for and recover judgment for the amount. They had no remedy in equity or otherwise to compel him to secure it, to ship stock to them, or to perform his executory agreement to them, if any, otber than to sue in an action of assumpsit for the amount.

Arnold vs Maynard, 2 Storey C. C. 349.
Kinloch vs. Craig, 3 Term. 119-783.

The bankrupt, Emmons, could have ceased consigning to them and have consigned to others, and left them remediless, except to sue for their general balance, as before stated.

It was like any other unsecured claim owing by the bankrupt, and if he had undertaken to pay or secure it by any other means, we think no question would have been raised as to the right of the assignee to recover such payment or to set aside such securities.

Wager et al. vs. Hall, 16 Wall. 584.

In the case at bar, the bankrupt paid $1,000 in money in addition to the proceeds of the sale to make up the balance due the plaintffs in error, and which sum is included in the verdict and judgment.

A general lien for a balance of accounts is founded upon custom and is not favored; and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties to establish it. General liens are looked at with jealousy, because they encroach upon the common law and destroy the equal distribution of the debtor's estate among his creditors.

2 Kent, Com. 636.
Rushforth vs. Hadfield, 6 East, 519.
S. C. 7 East, 224; Blearnden vs. Hancock, 4 Carr & Pa. 152; 3 Parsons on Cont., 239.

To constitute a lien by a Factor two things must concur; possession by the Factor, and a right in the principal to the property upon which the lien is to operate. The goods must

come into the actual possession of the Factor, *the property* of the principal; and therefore, if, before such possession, the principal has divested himself of all right and title to the goods, the lien can never attach.

In Ryberg vs. Snell, 5 Washington, C C R 404.
Bholen vs. Cleveland, 5 Mason, 174.

The property of the principal is divested by acts of bankruptcy, and the Factor will not be permitted to retain such goods for advances or acceptances against assignees, although the acts of bankruptcy were unknown to the factor at the time the the advances or acceptances were made.

Story on Agency, sec. 377.
Copland vs. Stein, 8 Term R 199.
Nichols et al. vs. Clent et al., 3 Price, 547.

Notice of acts of bankruptcy by the principal before the shipment, will defeat the factor's lien.

Russel on Factors, p. 207. (Law Library, vol. 46.)

Lord Mansfield, in delivering the opinion of the Court, in Foxcroft et al., assignees of Satterthwaite, vs. Devonshire, 2, Burrows, p. 937, says: "The whole transaction is admitted to be *before* any act of bankruptcy," and on page 940, "had the question turned upon the validity of a payment made *after* an act of bankruptcy committed within the act of 19 Geo. 2 C 32, (which was one of the points made at the trial) the direction would have been quite agreeable to the terms of that act."

2 Burrows, 937-940

If the doctrine contended for by the plaintiffs in error is correct, it gives to factors and commission men, receiving consignments and making loans and advances in anticipation thereof, superior advantages to any other class of creditors under the Bankrupt Act, and we fail to perceive any adequate reason to support the position. Confidence is the basis of all commercial transactions, and as necessary in the case of the wholesale dealer when he sells goods to the retailer, expecting re-payment from the proceeds of the sale of the goods, or in case of money loaned to enable any class of men to do business, as in case of a factor, or commission man, loaning money or making advances

in expectation of receiving consignments of goods for sale, whereby they can be repaid. We can perceive no superior equities in such a case.

V.

We submit further, that according to the record in this case, that the agreement or conspiracy mentioned on page 7 of the printed transcript, must for the purposes of this case be considered as proved. If this view is correct, it was such a fraud as vitiated the whole proceedings and would have entitled the assignee to recover.

The lien of a factor does not attach when the possession comes to him wrongfully or by fraud.

2 Kent Com., 638.
Lampriere vs. Pasley, 2 Term R. 485.
Madden vs. Kempster, 1 Camp N P 12.
Story on Agency, sections 360-361.

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